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Supreme Court of the United States

OCTOBER TERM, 1933

No. 400

CITY OF MARION, ILLINOIS, *a Municipal Corporation, et al.*, *Petitioners*

vs.

BEN SNEEDEN, *as Receiver of the* CITY NATIONAL BANK OF HERRIN, ILLINOIS, *Respondent.*

SUGGESTIONS BY AMICI CURIAE ON BEHALF OF THE PEOPLE OF THE PHILIPPINE ISLANDS, IN SUPPORT OF THE PETITION FOR REHEARING.

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SUGGESTIONS BY AMICI CURIAE ON BEHALF OF THE PEOPLE OF THE PHILIPPINE ISLANDS IN SUPPORT OF THE PETITION FOR REHEARING HERETOFORE FILED BY THE PETITIONERS HEREIN.

It is submitted that a reargument of this case should be ordered as requested by the petitioners in their petition for rehearing; and particularly for the following reasons:

1. This court in its opinion in this case said:

> "*First.* For the reasons stated in *The Texas & Pacific Railway Co.* v. *Pottorff*, No. 128, decided this day, we are of opinion that the Act of 1864 did not confer the power to pledge assets to secure any public deposits except those made under Sec. 45 by the Secretary of the Treasury of the United States."

It is submitted that in so deciding this primary question in this case upon the authority of *Texas & Pacific Railway Co.* vs. *Pottorff* this court overlooked the essential distinction between public deposits on the one hand, and private deposits on the other hand, in relation to the power of

banks to pledge assets to secure such two classes of deposits, respectively. The opinion in the *Pottorff case,* No. 128, *supra,* deals only with private deposits, and apparently not at all with public deposits; and the opinion in the instant case appears to overlook the wide distinction between these two different classes of deposits, which was pointed out in the briefs in the present case.[1]

2. This court further says in its opinion in the present case:

> "In some States national banks had, prior to the 1930 amendment, frequently pledged assets to secure public deposits of the State or of a political subdivision thereof; comptrollers of the currency knew that this was being done; and they assumed that the banks had the power to do so. But the assumption was erroneous."

And further that:

> "The contention that such power is generally necessary in the business of deposit banking has not been sustained."

It is submitted that the court has here overlooked essential points in the argument presented by the petitioners and by *amici curiae* in support of the power of national banks to secure public—(*as contradistinguished from private*)—deposits.

Petitioners' argument in this case is not understood to have rested primarily upon any contention of fact or opinion that such power so to secure public deposits was, when looked at from the bank's standpoint, "generally necessary in the business of deposit banking".

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[1] Petitioners' brief in support of the petition for the writ of certiorari, pp. 10-11; Petitioners' brief on the hearing of the case (petitioners' second brief), pp. 12-18, 42-59; "Supplemental Suggestions by Amici Curiae" filed at the time of the oral argument, pp. 4-6.

It did not rest upon any such question of fact.[2] On the contrary petitioners' argument here rested on ordinary grounds of statutory construction: That prior to the adoption by Congress of the National Bank Act of 1864 this court had indicated that banks did have power generally to pledge assets to secure *public* deposits;[3] that the Congress, therefore, in enacting Section 8 of the National Bank Act in 1864, granting to national banks the general powers "necessary to carry on the business of banking * * * by receiving deposits", must be deemed to have used that language in the light of those previous decisions of this court, and to have intended to grant the incidental powers then understood to appertain to the business of banking as generally carried on, including this power; that the statute has ever since been universally so interpreted by the federal executive authorities charged with its administration, particularly by successive comptrollers of the currency, for a period of now almost seventy years, and likewise by territorial legislative and executive authorities and by State legislatures; that the legislatures

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[2] Such a contention seems to have been made by counsel for the petitioner in the *private deposits* case,—the *Pottorff case*, No. 128, *supra*. And this court notes in its opinion in that case that: "The record is barren of evidence that the practice of so pledging assets has ever prevailed among national banks"; that is to say, of so pledging assets to secure *private* deposits. But as to so securing *public* deposits the practice is precisely the contrary; as to such *public* deposits it is believed to have been a well nigh universal practice among banks all over the country. *Confer* the letter from the deputy comptroller of the currency; Appendix II, *infra*, p. 16.

[3] *United States* v. *Robertson*, 5 Pet. (30 U. S.) 641 (MARSHALL, C. J.; 1831). *Planters Bank* v. *Sharp*, 6 How. (47 U. S.) 301 (WOODBURY, J.; 1848). And *confer* also the decision of the Court of Appeals of New York which covered private as well as public deposits: *Smith* v. *Lansing*, 22 N. Y. 520 (1860). All cited by petitioners and by *amici curiae* in former briefs herein.

of some thirty-seven States have apparently so construed it, as have likewise the territorial legislatures of the Philippine Islands and of Arizona (when Arizona was a Territory, acting under federal law), as well as various State and territorial executive authorities charged with the execution of the statutes of those jurisdictions;[4] that in reliance on such interpretation it has been the almost universal practice of national banks throughout the country thus to secure public deposits of various kinds by pledges of assets, and that very large amounts of such deposits have been and are being carried by many banks throughout the country;[5] that successive comptrollers of the currency have formally ruled in formal official opinions,—(particularly in the letter of former Comptroller of the Currency Pole, July 19, 1930, hereto appended),[6]—that national banks do have such power as to public deposits (*although not as to private deposits*); and that in reliance upon such rulings settlements have been made in the liquidation of many banks throughout the country in which

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[4] *Confer* petitioners' brief on the hearing (petitioners' second brief herein), pp. 57-59; "Supplemental Suggestions by Amici Curiae on Behalf of the Philippine Islands", filed herein at the time of the oral argument, pp. 3-4, and 5-14; and see also letter of former Comptroller of the Currency Pole, hereto appended (Appendix I, *infra*, pp. 5-14).

[5] E.g., approximately $63,000,000 for the Philippine Government distributed among 34 national banks and 13 state banks, members of the Federal Reserve System (original brief of *amici curiae* on behalf of the Philippine Islands herein, p. 5); approximately $125,000,000 by the City of Chicago in various banks (brief of *amicus curiae* on behalf of the City of Chicago, in this case, p. 2); and public deposits of various kinds thus secured, in upwards of 65 per cent of all of the national banks of the country at the present time, both those now open and those now closed and in the hands of conservators or receivers or liquidators (letter of the present deputy comptroller of the currency hereto appended; Appendix II, *infra*, p. 16).

[6] Appendix I, *infra*, pp. 8-15.

very large amounts of money,—running in the aggregate into many millions of dollars,—have been paid over to municipalities and other public agencies of different kinds, as the proceeds of sales of assets so pledged as collateral to secure such public deposits;[7] that such long continued uniform and uninterrupted interpretation of the statute for nearly seventy years by the federal executive authorities charged with its administration,—and by State and territorial authorities, executive and legislative, in relation to it,—is entitled to great weight in its construction; and that **the rule thus established has become a rule of property**, and should not be disturbed except for the gravest reasons. If changing public policy now requires a change in the rule, that is for the legislative authority.

So far as public policy is concerned this argument does not view the question from the standpoint of the banks; but rather, on the contrary, from the standpoint of the public welfare. As was said by Comptroller of the Currency Pole in his letter of July 19, 1930, to the Receiver of the Texas National Bank (Appendix I, *infra*, p. 11):

> "It is now generally conceded that the designation of a bank as a public depositary inspires confidence in the bank and increases its public usefulness, and it has become generally recognized that *it is a matter of public policy that public deposits, whether federal or state, should be secured and protected*, either by the pledging of assets or by other adequate method. It is of prime importance that public deposits, consti-

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[7] Letter from the present deputy comptroller of the currency; Appendix II, *infra*, p. 16.

Under these circumstances, absence of litigation during all the years is the strongest evidence of universal acquiescence. None of the thousands of depositors and general creditors adversely affected appears ever to have thought it worth while to contest decisions of receivers of all these hundreds of closed national banks permitting such payments under directions of successive comptrollers of the currency.

tuting as they do the funds essential to maintain the government, state and federal, be adequately protected so as to insure the continued functioning of the governmental machinery." (*Italics represent words underscored by the Comptroller of the Currency.*)

3. There is appended a copy of that letter from former Comptroller of the Currency Pole to the Receiver of the Texas National Bank, of Fort Worth, dated July 19, 1930, only four weeks after the 1930 amendment to Section 45 of the Act of 1864 (Section 5153 of the Revised Statutes), directing the Receiver's action in relation to such a secured deposit of the city, made prior to that amendment,[8] from which it appears that the contemporary opinion of the comptroller of the currency was that the 1930 amendment was *not* a new grant of powers to national banks, in so far as the power to secure *public* deposits is involved; but that, as to public deposits, the power thus to secure them had always existed under Section 8 of the National Bank Act of 1864. It is submitted that this contemporary official opinion of the comptroller of the currency, officially charged with the execution of the statute, when taken in connection with the clear indications in the formal reports of the committees reporting the bill[9] that it was the purpose simply to clarify and remove doubt as to existing power, and also in connection with the belief apparently held by all of the members of Congress taking part in the debate on the earlier amendment of Section 50 of the National Bank Act on February 21, 1916,[10] very far outweighs the oral statement by Senator Thomas in the course of the debate in introducing the bill, quoted by this court in Footnote 13

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[8] Amendatory act of June 25, 1930, c. 604, 46 Stat. 809.

[9] Quoted in petitioners' brief on the hearing herein (petitioners' second brief), p. 23, foot-note "1".

[10] Quoted on pages 15 to 23 of the Appendix to the "Supplemental Suggestions by Amici Curiae on Behalf of the Philippine Islands" filed herein at the time of the oral argument.

of its opinion in the *Texas & Pacific Railway Co.* v. *Pottorff case*, No. 128, *supra*. Or, rather, it is submitted that Senator Thomas in his oral statement did not really mean to change the effect of the formal report of his committee as to the purpose of the bill being merely to clarify existing powers and not to grant new powers,—dealing wholly, of course, with giving security for public deposits, as contra-distinguished from private deposits.

4. It is understood that somewhat analogous questions are presented in the petition for certiorari now pending before this court in Case No. 802 at the present term, *John C. Lewis, Receiver of the Hancock National Bank of Sparta, Georgia,* vs. *Fidelity and Deposit Company of Maryland.*

CONCLUSION

It is submitted that in view of the great public interests involved, the petition for rehearing should be granted and a reargument allowed.

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APPENDICES

Appendix I—Letter of former Comptroller of the Currency Pole, July 19, 1930.

Appendix II—Letter of the present Deputy Comptroller of the Currency.

APPENDIX I

LETTER OF FORMER COMPTROLLER OF THE CURRENCY, J. W. POLE

July 19, 1930

Mr. R. L. Van Zandt, Receiver,
Texas National Bank,
Fort Worth, Texas.

Dear Sir:

Reference is made to your letter of July 7, 1930, and to previous correspondence, concerning the course to be pursued by you as Receiver with reference to taking action against the City of Fort Worth to recover the value of certain collaterals of a face value of $208,678.36 which had been pledged by the Texas National Bank with the City to secure its deposit, said collaterals having been foreclosed and sold by the City subsequent to suspension and applied on account of the deposit balance of $218,540.77, leaving a deficiency of $23,192.17, for which amount the City now desires to file a general claim against your trust.

The Depositors Committee of the bank is of the opinion that the pledge of these collaterals was *ultra vires* and invalid and has made formal demand upon you that appropriate action be taken to recover the value of the collaterals from the City, and your general counsel has submitted a memorandum from which it appears he is inclined to take the same view. We have submitted the matter to our legal department and after full consideration of the various factors involved, we have reached the conclusion, for the reasons hereinafter stated, that it was not *ultra vires* on the part of the Texas National Bank to pledge these collaterals and that under the existing circumstances no action should be taken by you to attempt to set the pledge aside.

The collaterals were pledged in accordance with the provisions of a contract of August 31, 1925, between the City of Fort Worth and the Texas National Bank, wherein the

bank agreed at all times to pledge collaterals corresponding in amount to the amount of the deposit balance. It thus appears that the contract of pledge was executed approximately four and a half years prior to suspension of the bank, and it is understood that no question is raised as to the good faith of the parties in making the contract, or in pledging the collateral in pursuance thereof, and there seems to be no basis for believing, and in fact it is not understood that it is contended, that the pledge of the collateral was contrary to Section 5242 U.S.R.S. prohibiting pledging of collaterals or transfer of assets in contemplation of insolvency with a view to preferring one creditor over another. Hence, it is necessary to consider only the question of whether or not it was *ultra vires* on the part of the bank to pledge the collateral under the existing circumstances.

It appears that the state statutes require that city deposits be secured by bond, but no provision is made for the pledging of collaterals to secure deposits, and consequently it cannot be said, in the instant case, that the city deposit was secured in the manner designated by the state statutory requirements. A similar situation was passed upon by the Commission of Appeals of the State of Texas in the cases of *Foster et al* v. *City of Long View et al,*[11] and *Austin Banking Commissioner* v. *Lamar County,*[12] both decided on April 23, 1930, wherein the court held that certain pledges of collateral by *state* banks were invalid because not specifically authorized by state statute. The position of your counsel, and of the Depositors' Committee, is that these decisions are controlling, in that the state statute contains no provision authorizing the pledging by a depository bank of collaterals, as distinguished from the giving of a bond to secure deposits.

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[11] 26 S. W. (2d) 1059.
[12] 26 S. W. (2d) 1062.

The reasoning upon which the court based its decisions in the two cases above mentioned was that:

A. It is contrary to the public policy of the state for a bank to pledge its assets as security for deposits, in that such course:

   (1) Destroys the confidence of the public in the bank,
   (2) Impairs its public usefulness, and
   (3) Allows a selected few of the depositors to obtain an advantage over the general depositors, and

B. A bank can only pledge its assets or give security for deposits where specific statutory authority permits a departure from such public policy, and in such case the pledging must be in accordance with the requirements of the statute.

This reasoning is also substantially the basis of the cases cited by the court in support of its decisions.

We are unable to conclude that the state decisions above mentioned correctly set forth the applicable principles so far as national banks are concerned.

In the first place, it must be recognized that no state can, either by statute or by state decisions, establish or enforce the public policy of the state so as to restrict the functions of national banks permitted by federal law (*First National Bank* vs. *Missouri,* 263 U. S. 640; *Davis* v. *Elmira Savings Bank,* 161 U. S. 275; *Easton* v. *Iowa,* 188 U. S. 220; *Farmers and Mechanics National Bank* v. *Dearing,* 91 U. S. 29), nor can the states, by way of complement to the legislation of Congress prescribe additional regulations or auxiliary provisions affecting the operations of national banks (*Prigg* v. *Pennsylvania,* 16 Peters 539, 617-619; *Easton* v. *Iowa, supra,* 257). Consequently it would seem

clear that while it may be assumed that the *City of Long View* and the *Lamar County* cases, above referred to, are conclusive, so far as the power of *state* banks to pledge assets to secure deposits is concerned, such decisions cannot detract from, or restrict the powers of, national banks either expressly conferred or exercised as part of the incidental powers of a national bank.

Adverting next to the matter of public policy and the reasoning upon which the foregoing state cases were decided, it may be conceded that so far as private deposits are concerned the pledging of assets to secure the same does tend to destroy confidence in a bank, impair its usefulness, and give a selected few an advantage over the general creditors; but so far as public deposits are concerned, we feel that **it is now generally conceded that the designation of a bank as a public depositary inspires confidence in the bank and increases its public usefulness,** and it has become generally recognized *that it is a matter of public policy that public deposits, whether federal or state, should be secured and protected,* either by the pledging of assets or by other adequate methods. It is of prime importance that public deposits, constituting as they do the funds essential to maintain the government, state and federal, be adequately protected so as to insure the continued functioning of the governmental machinery. Consequently it is almost, if not completely, the universal practice in the states that public deposits be secured, either by pledging of assets or otherwise, so that it may be fairly said that the pledging of assets or the giving of bonds to secure public deposits (as distinguished from private deposits) has become an incidental function of banking, both state and federal. So far as national banks are concerned, Congress has specifically recognized, in principle, both the necessity for the protection of public deposits and *that the pledging of assets of a bank to secure public deposits is a proper operation in the functioning of banks.* Section 5153 U. S. R. S. provides for the designation by the Secretary of the

Treasury of national banks, as depositaries of the Federal public monies, and requires such national banks

> "to give satisfactory security, by the deposit of United States bonds and otherwise, for the safekeeping and prompt payment of the public money deposited with them, and for the faithful performance of their duties as financial agents of the government."

Section 5234 U. S. R. S. provides that the Comptroller of the Currency may deposit in national or state banks monies derived from the liquidation of insolvent national banks, and that such depositary banks shall

> "deposit United States bonds or other satisfactory securities with the Treasurer of the United States for the safekeeping and prompt payment of the money so deposited. Such depositary shall pay upon such money interest at such rate as the Comptroller may prescribe, not less, however, than two per centum per annum upon the average monthly amount of such deposits."

Section 5136 U. S. R. S. provides, *inter alia,* as to the powers of national banks, that they shall have authority

> "to exercise * * * all such *incidental powers* as shall be necessary to carry on the business of banking * * *".

It has long been the established policy of this office to recognize that national banks do have, as an "incidental" power, the authority to pledge assets to secure *public* deposits, state as well as federal, and national banks throughout the country have not hesitated, so far as the interpretation of the national banking law by this office is concerned, to pledge their assets to secure such deposits. The construction placed upon a statute by the office charged with its execution and administration is entitled to weight, by the courts, in interpreting the statute. See *Kern River Company* v. *U. S.,* 257 U. S. 147; *Corsicana National Bank*

v. *Johnson,* 251 U. S. 68; *First National Bank of St. Louis* v. *Missouri,* 263 U. S. 640; *United States* v. *Minnesota,* 270 U. S. 181.

This universal practice of giving security, either by way of pledging assets, or otherwise, for public deposits, was very recently again recognized, as a matter of public policy and of incidental banking powers, in the Act of June 25, 1930 (Public No. 431, 71st Congress),[13] amending Section 5153 of the United States Revised Statutes as follows:

> "Any association may, upon the deposit with it of public money of a State or any political subdivision thereof, give security for the safe-keeping and prompt payment of the money so deposited, of the same kind as is authorized by the law of the State in which such association is located in the case of other banking institutions in the State."

This statute does not, in our opinion, confer any new powers upon national banks, but is intended merely to regulate the existing powers of national banks and to restrict, in the future, the giving of security by national banks to the practice followed by state banks and thereby render the practice uniform as to both national and state banks. The statute will doubtless be of substantial value in meeting future questions, but of course it cannot be retroactive in its operation so as to affect adversely, completed transactions.

We have no doubt that the pledge of assets was made by the Texas National Bank, in the instant case, in reliance upon the generally recognized policy of this office that it is proper for a national bank to pledge its assets to secure public deposits. The contract providing for the pledge of such assets was made approximately four and one-half years prior to suspension and apparently was observed in good faith by the parties thereto during all of that period. The Texas National Bank received the benefit of the con-

[13] Chap. 604, 46 Stat. 809, *supra.*

tract by obtaining the deposits thereunder, and the deposits were made by the City in consideration of the pledging of the assets.

The City of Fort Worth is not seeking to set aside this contract, and it does not seem fitting that the Bank, or its Receiver standing in its place, should do so. In this connection a distinction is to be noted between the power of a national bank to pledge its assets to secure a state public deposit (or of a political subdivision thereof) and the power of the state public officer to make the deposit and accept a pledge of collateral where the state statutes prescribe a different method of security for the deposit. If the national bank has the power to make the pledge, and the defect is merely in the power of the state officer to accept the pledge on behalf of the state, the basis of attack would be, not the lack of inherent power of the national bank to make the pledge, but the lack of power of the state officer to accept the pledge and make the deposit. Consequently, if in such case, in spite of the breach of state statutory requirement as to the *method* of securing the deposit, the state has nevertheless been made whole or sees fit not to question the transaction, there would seem to be no occasion for it to be questioned by the bank, inasmuch as the wrong would have been committed, not against the bank but against the state.

It is, therefore, our conclusion, in view of the foregoing, that it was not *ultra vires* on the part of the Texas National Bank to pledge these collaterals, and that the restrictions imposed by the state upon the powers of state banks cannot detract from the powers of the national bank, and that consequently, the state decisions above referred to have no application to the instant case; and that inasmuch as the parties to the contract have acted in good faith, and the contract has been performed, and is not being questioned by the City of Fort Worth, it is not proper that this office, through you as Receiver, attempt now to

set it aside. You are therefore instructed to approve the deficiency claim of the City of Fort Worth in the sum of $23,192.17, and issue a Receiver's Certificate covering the same. A copy of this letter is herewith enclosed for the consideration of your general counsel and for his information as to our reasons for the position herein taken, and a copy of the letter will also be sent by this office to the Depositors' Committee for its information.

Yours very truly,

J. W. POLE.
Comptroller of the Currency.

APPENDIX II

TREASURY DEPARTMENT
Washington eb

Comptroller of the Currency

March 6, 1934

The Judge Advocate General,
War Department,
Washington, D. C.

Sir:

In reply to your informal inquiry of March 6th concerning the percentage of National banks, open and closed, which have pledged assets to secure public deposits, other than deposits of the United States, you are advised that we estimate that such pledges have been made by more than 65 per cent of such banks, open and closed. Accurate information in this connection can be obtained from bank reports on file in this office, if desired, but several days clerical work is involved.

Secured claims of many such public depositors against closed National banks located throughout the United States have been allowed and reconciled by permitting the public depositors to retain the proceeds of the pledged collateral, valued at many millions of dollars.

Yours very truly,

F. G. AWALT
Deputy Comptroller